

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SAID OMAR**

Claimant

VS.

**TYSON FRESH MEATS, INC.**

Self-Insured Respondent

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Docket No. **1,035,559**

**ORDER**

Claimant requests review of the April 27, 2009 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 5, 2009.

**APPEARANCES**

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant suffered accidental injury arising out of and in the course of his employment on May 16, 2007. The parties were unable to agree on the nature and extent of claimant's disability that he suffered as a result of the accident. Claimant alleged he not only injured his left shoulder but also injured his cervical and lumbar spine. Consequently, claimant argued he suffered a K.S.A. 44-510e whole person permanent partial impairment and was entitled to compensation for a work disability. Respondent argued that claimant did not meet his burden of proof to establish a whole person injury to the cervical or lumbar spine and his compensation should be limited to a K.S.A. 44-510d scheduled disability to his left shoulder. Respondent further argued that during some of the weeks claimant received temporary total disability compensation he was also paid for performing interpreter services for respondent and should receive temporary partial disability compensation instead of temporary total disability compensation for those weeks.

The Administrative Law Judge (ALJ) determined claimant failed to meet his burden of proof to establish he suffered a K.S.A. 44-510e whole person permanent partial

impairment. Instead, the ALJ determined claimant suffered a K.S.A. 44-510d scheduled 10 percent permanent partial disability to his left shoulder. The ALJ further determined respondent was entitled to a credit for the difference between the temporary total disability compensation claimant received for 7 weeks when he should have received temporary partial disability compensation.

Claimant requests review of the nature and extent of disability as well as the credit to respondent for overpayment of temporary total disability compensation. Claimant argues he should not be penalized for having performed translations that were requested by the respondent while he was receiving temporary total disability compensation. Claimant further argues he suffered a whole body disability and is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent argues the ALJ's Award should be affirmed regarding claimant's scheduled disability. In the alternative, respondent argues claimant failed to sustain his burden of proof regarding his task loss and he did not make a good faith effort to find employment. Respondent contends claimant should have received 7 weeks of temporary partial disability benefits while he was being paid as an interpreter.

The issues for Board determination are the nature and extent of disability and whether claimant should have received temporary partial disability compensation instead of temporary total disability compensation for a 7-week period.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On May 16, 2007, while claimant was working, a beef carcass came off the chain and fell on his left shoulder and neck. Claimant testified that he felt immediate pain, weakness and threw up. He was taken to the doctor. Ultimately, arthroscopic surgery was performed on his left shoulder.

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of his work-related accident on May 16, 2007. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.<sup>1</sup> It is the situs of the disability, not the situs of the

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<sup>1</sup> K.S.A. 44-510d; K.S.A. 44-510e.

trauma, that determines which benefits are available.<sup>2</sup> If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structure, the disability is considered a scheduled disability.<sup>3</sup> The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>4</sup>

At the regular hearing, claimant testified that he could not raise his left arm above shoulder level. He further testified that neck pain prevented him from moving his head to turn to look to the left and made it difficult to look up or down. Claimant testified that he had to use his right hand for everything and could carry nothing heavier than dishes with his left hand.

A surveillance videotape was taken of claimant after he left the regular hearing. The claimant is seen turning his head completely to the left and also raising his left arm above shoulder level and leaning on the arm as it was placed against a wall. As the videotape surveillance continues claimant repeatedly looks to the left as well as up and down and raises his arm above shoulder level. Finally, claimant is seen leaving a store carrying a sack with his left arm. These were all physical activities that claimant had just testified he was unable to perform. And he had demonstrated to the ALJ that he could only raise his left arm level with his shoulder.

At the request of respondent, the claimant was examined on January 14, 2008, by Dr. Chris Fevurly, board certified in internal and preventive medicine with specialization in occupational medicine. The doctor reviewed claimant's medical records and performed a physical examination of claimant. The doctor noted a cervical MRI performed on July 17, 2007, resulted in normal findings. The claimant primarily complained of low back pain but also complained of neck and left shoulder pain. The doctor noted that on physical examination the claimant had limited range of motion of the neck but the doctor further noted that when the examination was not focused on claimant's neck he was observed turning his head which demonstrated a full range of motion. Dr. Fevurly concluded claimant may have suffered some mild soft tissue injury to his neck and low back and then developed severe symptom magnification. But the doctor concluded claimant did not have any ongoing or chronic injury as a result of the May 16, 2007 injury.

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<sup>2</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

<sup>3</sup> K.S.A. 44-510d(a)(13).

<sup>4</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

As a result of the inconsistent findings Dr. Fevurly ordered an MRI of claimant's lumbar spine. The MRI of claimant's lumbar spine revealed normal findings. Dr. Fevurly then examined claimant a second time on February 14, 2008. The physical examination again revealed limited cervical and lumbar range of motion. The doctor opined that claimant has DRE Cervical Thoracic Category I zero percent impairment and a DRE Lumbosacral Category I zero percent impairment pursuant to the *AMA Guides*<sup>5</sup>. The doctor concluded there were no objective factors identified in his evaluation of claimant that required imposition of permanent restrictions.

Dr. Fevurly was later provided the surveillance videotape taken of claimant. Dr. Fevurly noted that the videotape showed that claimant had full range of motion of his cervical spine. And that the videotape depicted claimant climbing in and out of cars, bending over at the waist and standing without any apparent difficulties. Dr. Fevurly concluded the videotape did not reveal any limitation to claimant's cervical or lumbar spine.

Dr. Pedro Murati examined claimant on March 5, 2008, at the request of claimant's attorney. The doctor reviewed claimant's medical records and performed a physical examination of claimant. Claimant complained of constant pain in the neck, left shoulder, low back and hips. Dr. Murati disagreed with the normal findings stated on the report interpreting the MRI of claimant's lumbar spine and instead concluded the MRI demonstrated an annular tear at L4-5 and a protrusion at L5-S1. Dr. Murati diagnosed claimant with frozen left shoulder, status post left shoulder arthroscopy with AC excision, acromioplasty, rotator cuff debridement vs. repair of labral abnormality; low back pain with signs and symptoms of radiculopathy; myofascial pain syndrome affecting the left shoulder girdle and extending into the cervical and thoracic paraspinals; right SI joint dysfunction; and left upper extremity CRPD type I. Based upon the *AMA Guides*, the doctor opined for the loss of range of motion of the left shoulder the claimant suffered a 14 percent left upper extremity impairment. For the CRPD I claimant suffers a 30 percent left upper extremity impairment. The two left upper extremity impairments were combined and converted to a 24 percent whole person functional impairment. For the myofascial pain syndrome affecting the cervical spine claimant suffers a 5 percent whole person functional impairment. For the myofascial pain syndrome affecting the thoracic paraspinals claimant suffers a 5 percent whole person functional impairment. For the low back pain secondary to radiculopathy claimant suffers a 10 percent whole person functional impairment. Dr. Murati then combined the impairments for a 38 percent whole person functional impairment.

Dr. Peter V. Bieri conducted an independent medical examination of the claimant at the ALJ's request. Dr. Bieri agreed that the evaluator who performed claimant's functional capacity evaluation indicated "no" on the validity of all seven of the validity tests.

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

And there was further indication that although claimant alleged his pain was a 10 on a scale with 10 being the greatest, curiously he laughed during the testing. But Dr. Bieri noted that he did not place much value on functional capacity evaluations as he does not think they provide an accurate prediction of anything.

Dr. Bieri noted that an MRI study was performed on claimant's lumbar spine on January 31, 2008, and it was interpreted as being within normal limits. And an MRI study was performed on claimant's cervical spine on July 17, 2007, which was reported as normal. Dr. Bieri further noted that when he reviewed the MRI he did not find an annular tear at L4-5 nor a posterior extrusion at L5-S1.

Claimant told Dr. Bieri that he had constant and unremitting pain in his left shoulder, neck and low back. Claimant further told the doctor that he was unable to turn his head to the left at all. When Dr. Bieri attempted to obtain active range of motion measurements of claimant's neck he was unable to obtain the necessary three separate measurements required for validity purposes. The doctor agreed that he was unable to detect any objective findings in claimant's cervical spine beyond claimant's subjective complaints. Likewise, Dr. Bieri was unable to obtain valid measurements of claimant's grip strength or range of motion of his cervical spine.

The doctor rated claimant with a 10 percent impairment to the left upper extremity for range of motion deficits which converts to a 6 percent whole person impairment. The claimant's cervical spine was rated as a DRE Cervicothoracic Category II 5 percent whole person impairment. The impairments combined for an 11 percent whole person impairment. Dr. Bieri agreed that the cervical spine impairment was based upon claimant's complaints and his stated inability to turn his head to the left. Dr. Bieri further opined that claimant did not have any permanent impairment to his lumbar spine that was attributable to his work.

Dr. Bieri was provided a surveillance videotape of claimant and agreed that it showed claimant turning his head and looking over his left shoulder which was a greater range of motion than he was able to perform when the doctor examined claimant. But the doctor concluded that the video did not change his opinion because the *AMA Guides* admonish the evaluator to not question a patient's integrity or complaints of pain. Dr. Bieri testified:

Q. Did you see that at times he demonstrated the ability to turn his head and look over his left shoulder?

A. Yes.

Q. And that would be a greater range of motion than he represented he was able when you saw him?

A. Yes.

Q. Did what you see on the video change in any way your opinion of whether Mr. Omar has injury to his cervicothoracic spine?

A. No.

Q. Did he appear to have any limitation of motion when observed on the video relative to his cervicothoracic spine?

A. I never saw him demonstrate what I would call full active range of motion for a - - rating purposes. He had some active range of motion, he certainly did.

Q. Did you detect any limitation by way of pain behavior otherwise as you observed him on that video?

A. No.

Q. Are you again, as you tell us you're not changing your opinion about the presence of cervicothoracic injury in the case of Mr. Omar, adhering to that portion of the AMA Guides you read to us a moment ago which indicates you don't question the validity of the presentation of Mr. Omar?

A. That's correct.<sup>6</sup>

Although the claimant complained of left shoulder, neck and low back pain the MRI of his cervical spine resulted in normal findings. The MRI of claimant's lumbar spine likewise resulted in normal findings. Although Dr. Bieri rated claimant's thoracic spine he agreed that such rating was based entirely upon claimant's subjective complaints and inability to move his head. And Dr. Bieri agreed the videotape revealed claimant had more range of motion than he had demonstrated when Dr. Bieri had examined him.

The ALJ discounted Dr. Bieri's rating for the cervical thoracic spine because claimant clearly had a greater range of motion than he had demonstrated when examined by the doctor. Simply stated, the claimant's complaints regarding his cervical and lumbar spine were, in this instance, refuted by the surveillance videotape. Dr. Fevurly noted that the videotape revealed claimant did not have any limitation in the range of motion of claimant's cervical spine. Likewise, claimant did not show any range of motion difficulties with his lumbar spine nor did he demonstrate any limitation due to pain behavior. Accordingly, the videotape corroborated Dr. Fevurly's opinion that claimant had not sustained any permanent impairment to either his cervical or lumbar spine. Moreover, Dr. Bieri agreed claimant did not have any permanent impairment to his lumbar spine as a result of the work-related accident. The ALJ discounted Dr. Murati's opinion regarding

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<sup>6</sup> Bieri Depo. at 46-47.

claimant's lumbar spine as he concluded the MRI showed an annular tear and disk protrusion but the other doctors did not make such a finding.

The Board agrees that the videotape surveillance of claimant undermined his credibility and refuted his complaints regarding his cervical and lumbar spine as well as his shoulder. The MRI diagnostic tests performed on claimant's cervical and lumbar spine revealed normal findings. Claimant failed to give appropriate efforts when taking the functional capacity evaluation and while demonstrating his physical ability when examined by Drs. Fevurly and Bieri. The Board finds, as stated by Dr. Fevurly, that claimant has failed to meet his burden of proof that he suffered any permanent impairment to his cervical or lumbar spine as a result of his work-related accident. Consequently, the Board affirms the ALJ's finding that claimant's permanent impairment is limited to a scheduled disability to the left shoulder.

The ALJ analyzed the evidence regarding claimant's impairment to his shoulder in the following pertinent fashion:

The doctor (Murati) believed claimant was not at maximum medical improvement for reflex sympathetic dystrophy disorder in the left upper extremity and myofascial pain syndrome based upon his findings claimant had a sweaty palm and a loss of range of motion in the shoulder. The doctor recommended claimant have a triple phase bone scan. Dr. Murati testified his rating for RSD was found in table 15, page 54 of the *AMA Guides* which assigns impairment for deficits of 17 specific "Major Peripheral Nerves."

The doctor believed claimant was impaired in most of them, especially "the ones feeding the hand." However, the doctor stated he was rating pain and not injury to the nerve. He stated in regard to damage to the nerve, "He might have some." Based upon what appears to be a strained diagnosis and a severe stretching of the use of the *AMA Guides*, the Court cannot ascribe credulity to the doctor's assessment. Moreover, the Court finds it inconsistent the claimant could allegedly suffer with pain disorders diagnosed by Dr. Murati and never seek treatment for the conditions. For the reasons stated the Court adopts the finding of Dr. Bieri for impairment of the shoulder.

The Board agrees and affirms.

Finally, the evidence established that while receiving temporary total disability compensation the claimant was paid by respondent to perform interpreter services. During this time period claimant was entitled to temporary partial disability. The ALJ concluded this resulted in an overpayment of temporary total disability compensation in the amount of \$1,225.42. Consequently, the ALJ determined respondent was entitled to a credit in that amount. The Board agrees and affirms.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 27, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge